JALALUDEEN ABDUL AZIZ

v.

THRUMALINGAM S RAJADURAI & ANOR

HIGH COURT MALAYA, ALOR SETAR
HISHAMUDIN YUNUS J
[CIVIL APPEAL NO: 12-39-98]
25 SEPTEMBER 2001

LAND LAW: *Sale of land - Sale and purchase agreement between plaintiff and defendants - Plaintiff a non-citizen of Malaysia - Whether prior approval of State Authority required - National Land Code, s. 433B(1)(b) - Memorandum of transfer - Whether merely to execute a memorandum of transfer amounts to 'dealing' - Whether a 'dealing' had taken place - Whether dealing in contravention of - Whether null and void by reason of s. 433C, National Land Code*

CONTRACT: *Sale and purchase of land - Legal status of sale and purchase agreement between parties - Failure to disclose that purchaser was non-citizen of Malaysia - Failure to obtain prior approval of State Authority - National Land Code, 433B(1)(b) - Whether agreement contains an object or consideration forbidden by ss. 433B and 433C, National Land Code - Whether agreement void by reason of s. 24 Contracts Act 1950 - Whether defendants received advantage under void agreement - Contracts Act 1950, s.66*

This was an appeal by the plaintiff against the decision of the sessions court judge dismissing the plaintiff's application for summary judgment against the defendants pursuant to s. 26A of the Subordinate Courts Rules 1980 ('SCR'). A sale and purchase agreement had been entered into by the parties and the plaintiff had paid the defendants a sum of RM47,000 as part payment towards the purchase of the house. The plaintiff was a non-citizen of Malaysia, and by reason of s. 433B(1)(b) of the National Land Code ('NLC') prior approval of the State Authority was required. The prior approval of the State Authority was never obtained at the time of the signing of the agreement or the execution of the memorandum of transfer or thereafter. The plaintiff informed the defendants that the memorandum of transfer and the sale and purchase agreement were thus null and void and that the defendants were not entitled to forfeit the amount already paid to them. The plaintiff requested for the return of the amount of RM47,000 paid to the defendants, but the defendants refused to do so. Hence, the suit by the plaintiff.

The defendants, in arguing that there was a triable issue submitted that merely to execute a memorandum of transfer does not amount to "dealing" and that a "dealing" takes place only when the memorandum of transfer is presented

to the land office for registration. The defendants further contended that s. 433B of the National Land Code (NLC) does not apply to the mere making of a sale and purchase agreement.

Held:

[1] Based on the definition of "dealing" as provided by s. 5 of the NLC, the mere execution of the memorandum of transfer by the transferor and the transferee, meaning that all the parties to the transaction having duly completed and signed the transfer form and their respective signatures duly attested, such a transaction by itself, is a "dealing". It is immaterial that the duly executed form has not yet been presented to the land office for registration. In the instant case, a dealing had taken place and it follows that by reason of s. 433(B)(1)(b), the execution of the memorandum of transfer should have been done with the prior approval of the state authority. (p 583 d-i)

[2] The sale and purchase agreement, in not disclosing that the purchaser was a non-citizen, and in requiring the parties to execute the memorandum of transfer, but without providing for the requirement of the prior approval of the state authority as stipulated by s. 433B(1)(b), contains an object or consideration that is forbidden by ss. 433B and 433C of the NLC. Hence, the object or consideration was unlawful and the agreement was therefore void by reason of s. 24 of the Contracts Act 1950. (p 584 d-e)

[3] The defendants to whom the amount of RM47,000 was paid by the plaintiff were persons who had received advantage under a void agreement. By reason of s. 66 of the Contracts Act 1950 the defendants were under an obligation to restore the money to the plaintiff. (p 584h)

[Plaintiff's appeal allowed with costs.]

Legislation referred to:
Contracts Act 1950, ss. 24, 66
National Land Code, ss. 5, 206, 207, 208, 209, 210, 211, 212, 433B(1)(b), C, Part 18
Subordinate Courts Rules 1980, s. 26A

For the appellant - Vazeer Alam; M/s Vazeer Akbar Majid & Co
For the respondents - Mr Nadarajan; M/s Nadarajan & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Hishamudin Yunus J:
This is an appeal by the appellant/plaintiff against the decision of the learned Sessions Court judge Alor Setar of 5 May 1998 dismissing the plaintiff's

application for summary judgment against the defendants/respondents pursuant to s. 26A of the Subordinate Courts Rules 1980 ("the SCR").

The claim by the plaintiff before the lower court was for the return of a sum of money amounting to RM47,000 from the defendants. The plaintiff claimed that he was entitled to the refund by reason of a void contract entered into between him and the defendants relating to the sale of a double storey bungalow house.

The plaintiff is a non-citizen but is a permanent resident of Malaysia. The defendants were the registered owners of a double storey bungalow house situated in Lorong Kelumpang, Bakar Bata, Alor Setar. They were desirous in selling the house, and the plaintiff was interested in buying. So on 20 November 1994, the plaintiff entered into a sale and purchase agreement with the defendants. Upon signing the agreement and in accordance with the terms of the contract the plaintiff paid a deposit of RM27,000. The balance of RM243,000 was to be paid in three months' time. As the full payment was to be effected by way of a bank loan, the plaintiff subsequently at a later date paid the defendants another RM20,000, this sum being the difference between the purchase price and the amount of loan the plaintiff would be getting from a financial institution. All in all the plaintiff has paid the defendants RM47,000.

The National Land Code ("the NLC") restricts the ownership of land by non-citizens. The buyer/plaintiff, being a non-citizen, was required by s. 433B of the NLC to obtain the prior approval of the State Authority of Kedah before the defendants could transfer the property to him.

It is to be observed, however, that the aforesaid sale and purchase agreement did not mention anything about the status of the plaintiff (being a non-citizen) or the statutory requirement to obtain the prior approval of the State Authority under the said s. 433B. On the contrary, the agreement requires the parties to the agreement to execute the memorandum of transfer contemporaneously upon the execution of the sale and purchase agreement. Clause 3.01 of the agreement stipulates:

> 3.01 Execution And Delivery Of Transfer Documents
>
> The Vendors shall upon execution of this Agreement execute or cause to be executed a valid and registrable memorandum of Transfer in respect of the said Property in favour of the Purchaser and/or his nominee and shall deposit the same together with the relevant stamp proforma with the Purchaser's Solicitors subject to the Purchaser's Solicitors' undertaking to submit as soon as practicable the same to the Stamp Office for the purpose of adjudication of the ad valorem stamp duty payable thereon and not for any other purpose.

And in compliance with the above Clause, the memorandum of transfer (the transfer form - Form 14A of the NLC) was duly executed by the parties on the same day the agreement was executed.

Accordingly, by a letter dated 16 March 1995 the plaintiff's solicitor wrote to the State Director of Land and Mines, Kedah, for an approval to transfer the land (i.e. the house) to the defendants. Paragraphs 4 and 5 of the letter of 16 March 1995 read:

> 4. En. Jalaludeen A/L Abdul Aziz adalah seorang pemastautin tetap di Malaysia selama 40 tahun. Beliau menjalankan perniagaan di Malaysia dan kesemua ahli keluarganya ada bersama beliau. Beliau ingin membeli hartanah tersebut untuk kegunaan kediaman beliau dan keluarganya.
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> 5. Berdasarkan fakta-fakta di atas kami bagi pihak En. Jalaludeen A/L Abdul Aziz dengan rendah diri memohon kebenaran dari pihak tuan mengikut kehendak Kanun Tanah Negara untuk menerima pindahmilik tersebut.

He was not successful in getting the approval. Paragraph 2 of the letter of the State Director of Land and Mines of 19 September 1995 states:

> 2. Inilah dimaklumkan Pentadbiran ini belum lagi dapat menimbangkan permohonan tuan seperti tersebut di atas kerana dasar pemilikan tanah oleh warganegara/syarikat asing masih lagi dalam kajian Pentadbiran ini dan belum lagi diwartakan dalam Aturan Tanah Negeri Kedah Darul Aman.

Meanwhile by a letter dated 3 August 1995, the defendants' solicitors wrote to the plaintiff asking payment of the balance of the purchase price and that should the plaintiff fail to make the payment the defendants would terminate the agreement and forfeit the amount of RM47,000 already paid by the plaintiff.

In response, the plaintiff's solicitors wrote to the defendants' solicitors informing them that the memorandum of transfer as well as the sale and purchase agreement were null and void by reason of s. 433C of the NLC and that the defendants were not entitled to forfeit the amount already paid to them. The plaintiff's solicitors requested for the return of the amount of RM47,000 paid to the defendants, but the defendants refused to do so. Hence the suit by the plaintiff.

The plaintiff's summons and statement of claim were filed on 2 September 1997.

The defendants' statement of defence and counter claim were filed on 24 February 1998.

The plaintiff's reply and defence to counter claim was filed on 15 March 1998.

The plaintiff's application for summary judgment pursuant to O. 26A of the SCR was filed on 6 April 1998.

The appellant's counsel, Encik Vazeer Alam, in arguing that there is no triable issue, submitted that the agreement as well as the Form 14A was null and void by reason of s. 24 of the Contracts Act 1950 and ss. 433B and 433C of the NLC. As such the plaintiff was entitled to a refund of the amount of RM47,000 pursuant to s. 66 of the Contracts Act.

Section 433C of the NLC states:

> 433C. **Disposal, dealing, etc in favour of a non-citizen and foreign company in contravention of section 433B to be null and void.**
>
> After the commencement of this Part, any disposal of land by the State Authority, or any dealing or other act with regard to alienated land or any interest therein, in contravention of section s. 433B shall be null and void.

Section 433B of the NLC stipulates:

> 433B. **Non-citizens and foreign companies may acquire, etc land only with approval of State Authority.**
>
> (1) Notwithstanding anything contained in this Act or in any other written law:
>
> (a) ...
>
> (b) a dealing under Division IV with respect to alienated land or an interest in alienated land may be effected in favour of a non-citizen or a foreign company;
>
> ...
>
> but only after the prior approval of the State Authority has been obtained upon an application in writing to the State Authority by such non-citizen or foreign company.

Section 5 of the NLC defines dealing as:

> "dealing" means any transaction with respect to alienated land effected under the powers conferred by Division IV, and any like transaction effected under the provisions of any previous land law, but does not include any caveat or prohibitory order;

There was no dispute that a sale and purchase agreement had been entered into by the parties and that the plaintiff had paid the defendants a sum of RM47,000 as part payment towards the purchase of the house. It was also

not disputed that the plaintiff was a non-citizen and that by reason of s. 433B(1)(b) of the NLC prior approval of the State Authority was required before the house could be transferred by the plaintiff to the defendants. It was also not disputed that the memorandum of transfer had been executed by the parties and that the prior approval of the State Authority was never obtained at the time of the signing of the agreement or the execution of the memorandum of transfer or thereafter. However, the learned counsel for the defendants, Encik Nadarajan, in arguing that there was a triable issue submitted that merely to execute a memorandum of transfer (Form 14A) does not amount to "dealing". Learned counsel argued that a "dealing" takes place only when the memorandum of transfer is presented to the land office for registration. He further contended that s. 433B does not apply to the mere making of a sale and purchase agreement: it only applies to dealings.

I agree that s. 433B(1)(b) applies only to "dealings" and does not apply to a sale and purchase agreement. However, with respect, I disagree with the suggestion that a dealing takes place only after a memorandum of transfer has been presented to the land office for registration. In my judgment, basing on the definition of "dealing" as provided for by s. 5 of the NLC and after a careful consideration of the scheme of the provisions of Division IV of the NLC, which deals with "dealings" involving alienated lands, the mere execution of the memorandum of transfer by the transferor and the transferee, meaning that all the parties to the transaction having duly completed and signed the transfer form and their respective signatures duly attested, such a transaction by itself, is a "dealing": it is, to borrow the wordings used in the definition of "dealing", a "transaction with respect to alienated land effected under the powers conferred by division IV". It is immaterial that the duly executed form has not yet been presented to the land office for registration. I am fortified in my view, particularly, by ss. 206-212 and the title of Part Eighteen of the NLC which reads:

Part Eighteen Registration Of Dealings

This heading implies that "dealing" and "registration" are two different aspects of the transfer process, the latter complementing the former. In other words, the act of registration, although mandatory in order to complete the process of transferring the property, it is, nevertheless, extraneous to, and not an element of, "dealing". One does not "register" a "dealing" if the concept of dealing already incorporates the act of registration.

If a dealing had taken place - and I hold that it had - it follows then that, in the instant case, by reason of s. 433B(1)(b), the execution of the memorandum of transfer should have been done with the prior approval of the State Authority.

Now, since no prior approval of the State Authority had been obtained by the plaintiff in respect of the transaction, therefore, such dealing was in contravention of s. 433B(1)(b) of the NLC. And since the dealing was in contravention of s. 433B(1)(b) of the NLC, it was null and void by reason of s. 433C of the same.

What about the legal status of the sale and purchase agreement between the parties? Section 24 of the Contracts Act 1950 provides that:

> 24. **What considerations and objects are lawful, and what not.**
>
> The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by law;
>
> ...
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

In my judgment, the sale and purchase agreement, in not disclosing that the purchaser was a non-citizen, and in requiring the parties to execute the memorandum of transfer - but without providing for the requirement of the prior approval of the State Authority as stipulated by s. 433B(1)(b) - contains an object or consideration that is forbidden by law, that is to say, forbidden by ss. 433B and 433C of the NLC. Hence the object or consideration was unlawful and the agreement was, therefore, void by reason of the above s. 24 of the Contracts Act.

Further, as I have hold that the agreement was void, it is also my judgment that by reason of s. 66 of the Contracts Act the defendants were under an obligation to return the RM47,000 to the plaintiff. The provision reads:

> 66. Obligation of person who has received advantage under void agreement, or contract that becomes void.
>
> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

In the present case, the defendants to whom the amount of RM47,000 was paid by the plaintiff were persons who had received advantage under a void agreement. Thus they were under an obligation to restore the money to the plaintiff.

Based on the above reasons, I find that the defendants have no defence to the plaintiff's claim. Accordingly, I have allowed the plaintiff's appeal with costs and I ordered the defendants to return the amount of RM47,000 to the plaintiff.

Appeal allowed with costs; the sum of RM47,000 to be returned by the defendants to the plaintiff.